UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ELLIOT SOMMER, et al.,

Plaintiffs,

v. 16 Civ. 1820 (JGK)

comSCORE, INC., et al.,

Defendants.

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New York, N.Y.
October 27, 2016
4:40 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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BY: STEPHEN A. SWEDLOW

PERKINS COIE LLP
Attorneys for Defendant Rentrak Corporation
BY: RONALD L. BERENSTAIN (by telephone)
SEAN C. KNOWLES (by telephone)

ALSO PRESENT: THOMAS CUSHING

(Case called)

MR. CHANDRASEKHAR: Jai Chandrasekhar, Bernstein Litowitz Berger & Grossmann, for the lead plaintiffs in the federal action.

THE COURT: The connection is not very good. We are getting static.

MR. CHANDRASEKHAR: Your Honor, would you like us to call back in?

THE COURT: Yes. I think that's better. If anyone is on a speaker phone, they should pick up. But when you speak, there is static on the phone. It's like it's being recorded. It's not, though, is it? Yes, no? Is there no answer?

MR. CHANDRASEKHAR: We are not recording. I apologize for the clicking. We should call back in. We will do that right away.

THE COURT: Thank you.

(Pause)

MR. BERENSTAIN: Also on the line, your Honor, this is Ron Berenstain and my colleague, Sean Knowles, from Perkins Coie in Seattle, and we represent Rentrak Corporation and its officers and directors who are defendants. I can name them all, if you wish.

THE COURT: No. That's ok.

Anyone else on the phone?

MR. BROWNE: Good afternoon, your Honor, this is John

Browne from Bernstein Litowitz, also on behalf of the securities plaintiffs.

MR. NIRMUL: Good afternoon, Sharan Nirmul from Kessler Topaz Meltzer & Check for the named plaintiff William Huff.

MR. JENSEN: Jessie Jensen, Bernstein Litowitz, for the plaintiffs.

MR. LEVITON: Thank you, your Honor. Jason Leviton from the law firm Block & Leviton, on behalf of the state court plaintiff, Mr. Ira S. Nathan.

MR. FLEMING: Good afternoon, your Honor, Joel Fleming, also of Block & Leviton on behalf of Mr. Nathan.

MR. STINE: Good afternoon, your Honor, Carl Stine with Wolf Popper, New York counsel for Mr. Nathan in the Oregon actions.

MR. ANDREWS: Good afternoon, your Honor, Peter Andrews, Andrews & Springer, counsel for Ira Nathan in the Oregon action.

THE COURT: So many people representing Mr. Nathan.

MR. SWEDLOW: Good afternoon, your Honor, Stephen Swedlow of Quinn Emanuel on behalf of defendants comScore, Inc., Serge Matta and Mel Wesley. And with me is Tom Cushing, deputy general counsel of comScore, Inc.

THE COURT: Mr. Chandrasekhar, it sounds like we are on the speaker phone. I hear all sorts of things going on,

like you're shuffling papers. Please pick up.

MR. CHANDRASEKHAR: Yes. I apologize, your Honor.

THE COURT: If you want to put us on mute, that's fine, but we really don't want to hear the paper shuffling.

If any of the parties on the phone speak, please say who you are because we are in the courtroom and I have a court reporter.

All of this began, so far as I can tell, with the motion by comScore to stay discovery in the Oregon actions. ComScore was then joined by other defendants in the Oregon actions and the parties have taken various positions. I am familiar with the papers. I'll listen to argument briefly, because I am familiar with the papers, and there are so many of you.

Mr. Swedlow.

MR. SWEDLOW: Thank you, your Honor. Briefly, I just want to identify what is the position of comScore and what is not.

Under the Private Securities Litigation Reform Act there is an automatic stay and under SLUSA there is a provision for federal courts to stay state court actions.

The argument here is simply an analysis of those three factors that the Court must consider, not --

THE COURT: Why do you say the Court must consider?

MR. SWEDLOW: The Court would consider in the context

of deciding whether to grant a stay.

THE COURT: Hold on. Why do you say that? I realize that some courts have looked to those factors, but it's not so clear to me where they come from. There is no Court of Appeals decision that says, here are the factors to be considered. I looked at the statute. The statute doesn't provide for those factors. The statute says I may do it as necessary in aid of the Court's jurisdiction or to protect or effectuate its judgments. And I'm just not sure where courts have developed those factors.

MR. SWEDLOW: I agree with you that the Section 78 of the statute does not say these are the three factors that you must apply, so I withdraw the must part. There are three factors that have been considered by courts to determine whether a stay in a state court action would be appropriate because of the automatic stay in a federal action. And I think the reason those are the factors, but this is not -- I'm not the Court of Appeals and I'm not telling you this is why you have to consider those factors. But the reason those factors are relevant is that the point of the stay is to allow the defendant, without having to go through the burden of discovery, to make a motion to dismiss with the stay of discovery.

THE COURT: The problem with the way in which you phrase that is, the purpose of the stay is to allow the

defendants to proceed with the motion to dismiss without having to go through the burden of discovery. That's in this case and that's true. There is a stay in this case so that the defendants don't have to go through discovery in this case. It doesn't answer the question of whether if there are legitimate reasons to go through discovery in another case, the defendants don't have to go through discovery in another case.

Now, admittedly the other case can't be used as a way to circumvent Congress' desire to have a stay of discovery in this case, but then that requires some analysis of the relationship between the other case and this case.

The Oregon plaintiffs say that in all of the cases you cite, with one exception, where stays were granted the state court actions were brought after the federal action, so there is a whiff that the state court actions get brought as a means of avoiding the stay of discovery in the federal action. Maybe it doesn't have to be proven that it's done for such a reason, but that's a fact that that's what happens.

My first question is, is that right?

MR. SWEDLOW: Is that right in terms of adding up the case law?

THE COURT: Yes.

MR. SWEDLOW: Let me explain to you the timing of the filings here because there is confusion about that. ComScore was not a party to the In Re Rentrak merger litigation until

July of 2016 and the allegations in the original merger litigation had nothing to do with comScore's alleged financial misstatements. That case was filed after the federal case was filed. The other --

THE COURT: The first Oregon action was filed five months before the federal action. Yes, comScore was brought in more recently. But the action was there and has been proceeding and still has the same trial date in November of 2017. The fact that they added additional defendants doesn't change that, right?

MR. SWEDLOW: It hasn't changed it yet. But the motion to dismiss that was filed by comScore is still pending.

All I'm trying to clarify is that the claim against comScore for aiding and abetting the disclosure of financial statements in the context of the merger, that claim was filed against comScore in the case that already existed and comScore was added in July. The motion for leave to add comScore as a defendant was after these federal cases were filed.

Similarly, the other Section 11 case that is now filed in Oregon state court was filed in October of 2016, after the hearing on the motion to dismiss in the Oregon case.

THE COURT: Is it true that the second Oregon case can't be removed to federal court?

MR. SWEDLOW: No, it's not true. But I don't know that we should debate that here because the view of the Oregon

state court plaintiffs will be different than the view of the defendants on the removability of that case.

THE COURT: What's the time to remove it, if it could be removed?

MR. SWEDLOW: Depending on which acceptance of service, it would either be November 6 or November 11 because depending on who is removing, if the defendant who is served has 30 days until November 11 and the others consent, then it would be November 11. But the earliest possible would be November 6.

THE COURT: Do one or more defendants intend to remove the second case?

MR. SWEDLOW: I don't know. I'm in federal court and you are asking me that question, but I think that decision has not yet been made. It's certainly being contemplated.

THE COURT: You don't have to disclose defense strategy. I agree with you, it's not directly relevant to the answer to whether there should be a stay.

What's the argument that it's not removable?

MR. SWEDLOW: I think that would be their argument, that it's not removable.

THE COURT: I know. You have no idea?

MR. SWEDLOW: I do know why it would not be removable. There is concurrent jurisdiction for Section 11 and '33 Act claims and the question will be whether the removability of a

class action like the one that is filed is removable or isn't removable, and it's a pretty complicated decisional law analysis, and so somebody may seek briefing on that at some point.

THE COURT: So complicated it would be too difficult to explain to me at this point.

MR. SWEDLOW: No, not too complicated.

THE COURT: That's ok.

MR. SWEDLOW: I don't want to have a transcript of what I may argue later on behalf of clients who have not decided whether they want to argue that.

THE COURT: That's a fair statement. Go ahead.

MR. SWEDLOW: I am going to characterize these three factors quickly as factors courts have considered. And what I wanted to identify for the first factor, the risk of the federal plaintiffs obtaining the state discovery. It is not that I believe these lawyers are incorrigible and can't be told, don't share information. They would not share information if they are not supposed to share information.

The concern is that the Oregon state court action and the documents produced in that action will not all be designated confidential because they don't all satisfy the requirements to be a confidential document, and the filings in Oregon state court, at least according to the hearing I attended with that judge, are public filings.

Similarly, the hearings --

THE COURT: He was referring specifically to the complaint, not to all the filings.

MR. SWEDLOW: Judge Litzenberger was referring to the filing of the complaint when she said filings are public. Similarly, the hearing that's scheduled for class certification, which would undoubtedly involve documents obtained in discovery, is going to be a public hearing and maybe before this Court rules on the motion to dismiss.

THE COURT: Why should the appropriate date to be looked at be the argument date on the class action motion rather than the date that the plaintiffs have to file the amended complaint in response to your inevitable first motion to dismiss?

MR. SWEDLOW: In this case, you mean?

THE COURT: Yes. Because the structure and purpose of the PSLRA is to say to the plaintiffs, you have to come into court with a plausible claim. You can't give us whatever complaint you want and say, discovery will establish a claim. So give us your best complaint and be able to survive a motion to dismiss. We will have the plaintiff's best complaint on the date that was specified in the scheduling order, which is mid December, I think, for the plaintiff's amended consolidated complaint, December 14, which is before there will ever be a hearing on the class certification motion in Oregon. The

plaintiff, without benefit of any discovery, will had to have pleaded a viable complaint that survives a motion to dismiss in this court on or before December 14, 2016, right?

MR. SWEDLOW: Yes. That's the scheduling order you entered.

THE COURT: Why would you look at what comes out at the class action hearing later?

MR. SWEDLOW: Two reasons. One is that the automatic stay applies during the pendency of any motion to dismiss.

THE COURT: Sure.

MR. SWEDLOW: Not up until.

THE COURT: Yes, but so what. The purpose behind the stay is to force the plaintiffs to give a plausible complaint that survives the motion to dismiss and, yes, discovery is stayed until a decision on the motion to dismiss because if the case is going to be dismissed, then there shouldn't be discovery in the federal action, but that doesn't say that there can't be discovery in the ongoing action in Oregon, which is whatever I do on the motion to dismiss the federal action, the action in Oregon goes on unless -- the actions in Oregon unless the judge in Oregon decides to dismiss those actions, right?

MR. SWEDLOW: Correct. But let me just make sure I'm following the premise. The premise would be that that's the last best complaint that the federal plaintiffs can file and

then --

THE COURT: Isn't it?

MR. SWEDLOW: It may be. That would be up to you. Here is my concern with that structure and using that as the critical date. If discovery is produced in the Oregon action and made public and the federal plaintiffs, as would be their fiduciary obligation, obtained a publicly available information in furtherance of their claim, then at that point that information could and should appear in a reply on a motion to dismiss and the argument would be made to you, we need to amend our complaint to comport with the facts we now know from discovery and it's the doing of a useless thing for you to grant a motion to dismiss for us to just refile based on the discovery that was now obtained by the state court plaintiffs.

THE COURT: Isn't it a long way away from the notion that the PSLRA is there as a shield to protect defendants from implausible claims that can't even survive a motion to dismiss and to save the defendants the cost and burden of discovery from complaints that would otherwise be dismissed to take that as sort of the template, if you will, for the PSLRA to say, golly, in another legitimate case, which has been pending for some time, some truthful evidence may come out and it may be that the plaintiffs in this case soiled this case by attempting to place before you, Judge, some truthful evidence that has come out in this other litigation and you may decide that this

case actually has merit. You ought not to be doing that.

You ought to close your eyes to the fact that this other stuff may come out and be placed before you. Isn't that an odd structure? Would it be any more palatable if the plaintiffs came in and said, Judge, wholly independent of the other litigation, the New York Times just ran an exposé from whatever sources and came up with all of this and we didn't know about this, but it supports the allegations in our complaint and the defendants say, do not look at that. Truthful though it may be, you shouldn't look at that.

MR. SWEDLOW: The defendants wouldn't say, either do not look at that or truthful so it may be. What the defendants would say is that out of a group of let's say 10,000 e-mails an individual has either sent or received, you are seeing one e-mail in the string and now we are into a factual dispute about what that supports and what it doesn't support and that is inappropriate for motions to dismiss.

THE COURT: That's why motions to dismiss get denied, right, because there are factual disputes.

MR. SWEDLOW: But the automatic stay in securities cases is attempted at giving the defendants protection for meritless claims, but also preventing the discovery from being characterized in a way to support the opposition of a motion to dismiss. It's both purposes. It's not simply to protect the defendants from unnecessary discovery.

THE COURT: You raise an interesting question about other sources of information. It's a good hypothetical. Go ahead.

MR. SWEDLOW: The other point which we have blown past and I'd like to just clarify for the Court is that the plaintiffs in the Oregon case, as their claim is pending against comScore, are part of this class. They have not been chosen as the lead plaintiffs in this case. But the definition of that class are the Rentrak shareholders who got comScore stock and therefore are comScore shareholders for purposes of this case.

When we are talking about the risk of the federal plaintiffs obtaining discovery, this is a putative class, where that putative class, which is a significant percentage of this putative class, will undoubtedly -- their lawyers will get the discovery. It isn't like two separate entities or individuals are suing comScore. They are the same putative class, meaning, one, the federal case includes all comScore shareholders. The other, Oregon case, includes many comScore shareholders who are in the federal case.

So the risk of obtaining discovery for Mr. Nathan and his putative class, it's the same. It depend on whether you define a putative class as only the lawyers for that individual shareholder or whether you define them, as I believe you should, as both putative classes, because that's who the

discovery is sought on behalf of. When we are talking about a risk and we say that the federal plaintiffs won't get it, the federal plaintiffs include Mr. Nathan. He's in the class.

The second point regarding the factual/legal overlap is a factor that can be considered by courts, a factor I will just discuss briefly with you. The overlap of the claims against comScore, they are the same factually, meaning the claim is that comScore allegedly misstated its financials and whether that was disclosed in a registration statement or in the 10-Ks and 10-Qs, it's the exact same factual allegation. So whether or not there was a misstatement is going to be the subject matter of both litigations.

The overlap between comScore in those two cases is complete. I think you will hear some discussions about how the Rentrak claims, which relate to a merger, that many of those allegations comScore is not being accused of anything. That's a separate overlap question that I think Mr. Berenstain on the phone will address.

The third factor is the burden on defendants. In the papers we disclosed, and I will represent to you here that the internal investigation that started as a result of the letter that the audit committee received, which is the financial alleged misstatements investigation, has gathered 13 million documents. Not that 13 million documents will be produced in response to the discovery from the Oregon state plaintiffs, but

that is the universe of information that exists relating to the investigation.

The reason why that matters is one of the discovery requests is all documents concerning the investigation, which if I were the plaintiff I would also start there because why reinvent the wheel. What did the investigator find, the internal investigation. But that is a big burden. Not necessarily relating to the defendants, but there have been subpoenas issued to nonparties or third parties who hadn't touched the financial issues in any way, whether they advised comScore or --

THE COURT: Why is that argument not correctly addressed to the judge in Oregon if the discovery is burdensome? Oregon has local discovery rules which are fairly restricted. Isn't Oregon one of the states that has fairly restrictive rules, even stricter than Federal Rules of Civil Procedure?

MR. SWEDLOW: I think it depends on which discovery rule. If I can answer the first question, why isn't it addressed by the Oregon court, it's because the burden standard is not the same, whether a document is relevant and should be produced and the burden for producing documents that are relevant is what the Oregon court is going to consider. Whether or not you accept the decisional development of these factors, this third factor is not whether the discovery would

be burdensome such that you wouldn't have to produce it. It's whether producing the relevant discovery that you do have to produce would be burdensome. And the reason why that factor is being considered is, if it's like a request for books and records, as it was in one case, that's not a big deal and it doesn't burden the defendant.

THE COURT: I would have thought that if it is discovery that otherwise has to be produced in the Oregon action, then it's no greater burden on the defendant because they have to produce it in the Oregon action if it is legitimately sought for use in the Oregon action and meets the discovery rules in Oregon, and the motion to stay simply kicks the can down the road until there is a decision on the motion to dismiss the federal litigation before me, at which point the Oregon litigation still goes on and all of the same information will then be sought in Oregon and the Oregon judge will have to decide whether she believes that that discovery is appropriate in the Oregon action, exactly the same decision which the Oregon judge would have to decide now if there is no stay, right?

MR. SWEDLOW: Correct. What I'm saying is that the burden analysis for this factor is not whether the discovery is too burdensome to be produced. It's whether producing what you will have to produce is burdensome on the defendant. It's a different standard because if you don't have to produce it

because it's too burdensome, you wouldn't have to produce it, period. It's producing the discovery before the automatic stay is lifted. So there will be burdensome discovery that we will have to produce if we don't win the motion to dismiss.

THE COURT: Why does that articulation of the factor make any sense at all? Let's say it's a lot of discovery, but that's going to have to be produced anyway unless the Oregon judge says it doesn't fall within the discovery limits of the Oregon rules. That's going to have to be produced. The only thing that happens is, the can gets kicked down the road, the Oregon litigation is stopped until I decide the motion to dismiss, which everyone knows is months and months down the road. So between the PSLRA and SLUSA, the federal statutes are being used to stall what no one has said so far is not a legitimate action in state court in Oregon. I realize that there is a motion to dismiss pending in Oregon. And all of the arguments can be made to the state court judge in Oregon that discovery should not proceed until the judge decides the motion to dismiss. But that's very different from the entire Oregon action effectively should be stayed because they can't get discovery until I decide the motion to dismiss a wholly separate case.

MR. SWEDLOW: We may agree to disagree on this, but I don't believe they are a wholly separate case because it's the exact same factual allegations.

The only point I'm trying to make is that the automatic stay alleviates the burden of actual discovery that will be produced for a federal securities defendant, not that it's too burdensome so it doesn't have to be produced. And extending that stay to state court actions gives the exact same relief to the defendant, not that they can avoid the discovery.

And you are describing in kicking the can down the road is what this automatic stay does, just like it does in the federal case. It kicks the can down the road until the federal motion to dismiss is decided. But the burden isn't, you won't have to produce it ever. It's that producing it during the pendency of the automatic stay is a big deal, even if it's relevant and producible. That's the burden analysis. And I realize, we don't have to see it the same way. I'm just characterizing how courts have addressed it. Thank you.

MR. SWEDLOW: I am going to sit down now.

THE COURT: Thank you.

Anyone else want to speak in favor of the stay?

MR. BERENSTAIN: Ron Berenstain of behalf of the Rentrak defendants.

When this motion to stay was filed by comScore, of course, we were merely interested because we represent defendants in the Oregon merger litigation. But between the time the motion was filed and now, of course, the plaintiffs in this action filed the amended and consolidated complaint which

brings directly into this case a merger claim against Rentrak Corporation and its officers and directors.

Indeed, your Honor, it is the same purported class of former Rentrak shareholders who became comScore shareholders against the same defendants, Rentrak and its officers and directors, seeking exactly the same relief premised on exactly the same factual theory that the proxy statements, the legitimate proxy, joint proxy statement filed by comScore and Rentrak, which contained financial statements, comScore financial statements with the plaintiffs in both cases allege are false somehow, that the Rentrak directors somehow are responsible for those false financial statements based upon this report that the Rentrak directors engaged a financial firm to provide them in the course of the merger process.

In other words, the merger claim proceeding in Oregon, which is a breach of fiduciary duty claim that has a disclosure part of it, was taken wholesale and brought into this case. So we now have the identical case, different legal theories, but the identical case in federal court now. We have not even been served yet.

We are appearing especially because we thought that all the parties here or some of the parties here would think we had notice of comScore's motion, that if we didn't speak up now and ask to enjoin the stay that we might be precluded from seeking to do so later.

THE COURT: That's fine. Welcome.

MR. BERENSTAIN: What we have here, there really is no question about overlap, your Honor. Indeed, the plaintiffs here in New York have just taken the case wholesale and brought it into this case. So there is exactly the same case, which we are defending in Oregon. We now have presented here. And of course under the PSLRA, as you just discussed with Mr. Swedlow, the Rentrak defendants are entitled to an automatic stay and until such time as the Court decides what to do in terms of this case. Until the Court decides our motion to dismiss the case, the stay should apply to the claims against the Rentrak directors proceeding in Oregon.

And the risk of spillover is rather obvious. The discussions of the claim and the basis for the claim were taken directly by the lawyers in New York from the lawyers in Oregon. We are not saying they are colluding and we don't have to demonstrate they are colluding. The fact is that it would appear that they are competing rather than colluding, but that isn't the point.

The point is that the plaintiff can't have their cake and eat it too and basically that's the purpose of SLUSA, you can't get the benefit of some discovery from a non-PSLRA case and use it in a PSLRA case and that's exactly what we have here. We see it in the complaint. It's already been filed in this case and we assume that as discovery proceeds against the

Rentrak defendants that it's proceeding immediately.

We are producing documents tomorrow, starting a rolling production of more documents tomorrow. We can only assume that the plaintiffs in this case in New York will bulk up on whatever information they can appropriately or inappropriately get their hands on to further the theory that they got from the Oregon litigation. We have a direct overlap. We have a clear evidence of spillover and risk of more spillover and the burden issue. And the burden issue, the discovery that's being sought in Oregon is not de minimus. That's not the point. It's real discovery, obviously, a lot of it. There is no question that that is going on and that it will find its way into this case.

Now, the Oregon plaintiffs will say the case in Oregon has different issues in addition to the disclosure case which these two cases share. Yes, there are some other factual theories. But it's one merger case, your Honor. It's the same witnesses, the same meetings, the same transactions, the same possible that they should have considered --

THE COURT: Could I get a word in edgewise?

MR. BERENSTAIN: It's impossible, your Honor, to practically parse the discovery and say, well, you can't proceed with discovery related to this exposure issue because that's identical in both cases. That is not only impractical, but I think literally impossible.

The Rentrak defendants are entitled to the protection of the discovery stay now --

THE COURT: Yes. And you will have it. You will have it. You have a federal case in New York under the PSLRA and there is a stay of the discovery in New York until there is a decision on a motion to dismiss. You have not yet appeared in the New York action and no discovery is being sought from you in the federal action in New York, in any event.

You have your action in Oregon in which you are a defendant. Had the action in New York never been filed against you, you would have been required to produce whatever discovery you were required to produce in Oregon, right?

MR. BERENSTAIN: Yes. It expired.

THE COURT: October 2, right.

MR. BERENSTAIN: Yes, your Honor.

THE COURT: It's no more.

What would the result be if you didn't argue out effectively an effort to stay the Oregon actions by preventing any discovery going forward in Oregon but simply came in with a motion, either to this court or to the Oregon court, and said, stay one of these actions because they are so similar. Either stay the action in New York or stay the action in Oregon. What would the result be? Do you want to speculate?

MR. BERENSTAIN: That's exactly what we are contemplating right now, your Honor.

THE COURT: No. Hold on, please. Both of us can't talk at the same time. And when you are talking, the way the phone system works, you can't hear what I'm saying because the phone just cuts off. I know you are not doing it deliberately, but pause every now and then.

The motion before me is a motion to stay discovery in the Oregon actions. It's not a motion to stay the action, either in Oregon or to stay the action in New York. It's to stay discovery.

Now, the effect of a motion to stay discovery is in fact simply to stall the Oregon actions, which have been pending for over a year. The first Oregon action has been pending for over a year. So rather than a straightforward motion which attempts to argue two actions pending, first action should proceed, you bring a motion, you join a motion which simply says, strangle the action in Oregon by preventing any discovery in that action.

I understand what the motion is. I understand what the effect is. And my question is a substantive question. What would happen if you or any of your colleagues made a motion that said, we have two actions pending, one in state court, one in federal court? We shouldn't have to defend two actions. I would have thought that usually both actions go forward. Isn't that right? But you say no. We shouldn't have to be defending both actions, so strangle the Oregon action.

If you made a straightforward motion to ask for that relief, that would traditionally be denied, wouldn't it? Federal actions can proceed in the same way that state court actions can proceed. Both courts have an obligation to exercise their jurisdiction.

That motion is not before me. It hasn't been briefed. But what you are arguing is, we shouldn't have to defend in both places. If that's right, make the motion. But it's not clear to me why the way to accomplish that end is by simply saying, strangle the Oregon action by preventing any discovery in Oregon. That seems to me a little circuitous, which is a nice way of putting it. No, yes?

MR. BERENSTAIN: I want to make sure you are finished, your Honor.

The fact is that, of course, as you know, we just received notice of this case. We are thinking about our response to this complaint, which will bring on some kind of motion which could be a motion to dismiss on the merits or a motion to stay or those motions in the alternative. And, yes, your Honor is correct. We don't believe that either of the cases have any legal merit and we certainly don't believe our clients should be the party to two identical claims in two different courts.

But the public policy of the PSLRA and SLUSA together is that these plaintiffs, the same class that's already sued us

in Oregon, purported class, has chosen now to bring a federal case governed by the PSLRA in federal court, that these defendants that we represent are entitled to the benefit of the automatic stay until such time as this court, in response to whatever motions we bring, deals with it. And these plaintiffs are not entitled to use the discovery and the public information -- they are not entitled to the benefit of the discovery from the Oregon litigation which they have copied and are pursuing in this court.

So it is not a tactic on the part of the Rentrak defendants in any way. We certainly didn't ask to be sued in either place. It's a tactic on the part of the class and its representatives who have chosen this course and are trying to use the Oregon litigation in order to further their efforts in New York, and we will appropriately respond to the motion in New York and attempt to have this case dismissed just like we have the one in Oregon or at least end up litigating in one place or the other.

THE COURT: Let me ask you in another way. Are the discovery rules in Oregon more restrictive than the federal rules?

MR. BERENSTAIN: No, your Honor. It's actually the opposite. They are more restrictive with respect to experts. With respect to experts, there really is no discovery. With respect to fact discovery, they are much more liberal than the

federal rules are or in fact many, many states. And you can take as many depositions as you wish and depositions can go on day after day so that the typical restrictions in the federal rules adopted by many states are not in the rules in Oregon.

THE COURT: Does Oregon have a broader initial disclosure requirement than the federal rules?

MR. BERENSTAIN: There is no initial disclosure requirement in --

THE COURT: What is the scope of discovery in Oregon?

MR. BERENSTAIN: In this case, your Honor?

THE COURT: No. Just the way it's phrased in Oregon, in your rules.

MR. BERENSTAIN: The scope of discovery is similar to the federal rules.

THE COURT: Anyone else on behalf of the stay?

MR. SWEDLOW: Can I respond to a question that you asked Rentrak?

THE COURT: Sure.

MR. SWEDLOW: You asked why not make a straightforward motion to stop or strangle or stay one of these cases rather than using the policy PSLRA/SLUSA automatic stay of discovery.

For full disclosure, there are two bases for the pending motion to dismiss in the Oregon *In Re Rentrak* case filed by comScore. One is that the aiding and abetting claim has not been sufficiently alleged. It's just a different claim

than the federal securities claim because comScore has to have participated in some breach of fiduciary duty separate.

The other is, under Oregon rules, if there is the same action filed by the same parties earlier than the Oregon state court can, not must, but can dismiss the action rather than stay it. Strategically, for full disclosure, we would rather that comScore be dismissed from the Oregon action under that Oregon rule than the Oregon case be stayed, so we made the motion to dismiss.

The problem with staying, and you will probably hear from the federal plaintiffs on this issue, staying the federal case as it relates to comScore is that the class that includes the Oregon state plaintiffs, the federal class is bigger. It's all comScore shareholders as opposed to just the comScore shareholders who got comScore stock from the merger. So the argument would be, while the federal case --

THE COURT: The legacy Rentrak.

MR. SWEDLOW: Yes. Legacy Rentrak. The people who got shares as a result of the merger or acquisition got those shares, that's a subclass, not defined by you, but it is a smaller group than the federal plaintiffs which represent a class of everybody who has comScore shares who are allegedly injured by the wrongdoer.

THE COURT: Anyone else in support of the stay? Who wants to speak against the stay?

MR. FLEMING: Very briefly, Joel Fleming for Mr. Nathan. The remedy that the defendants are seeking is an extraordinary one. It's an extraordinary one because it's being sought from this court. As we have already discussed, the less extra remedy is to go and ask for this relief from the Oregon court. There is the motion to dismiss that comScore has filed on the basis of the federal action.

The Rentrak defendants, including Rentrak Corporation, the wholly-owned subsidiary of comScore, filed a motion to extend. The Oregon court had put in place a brief discovery stay during the pendency of the motions to dismiss that ran from June 3 to October 1.

After hearing six hours of argument on the motion to dismiss and then 10 minutes of argument on the motion to stay at the end, the Oregon court let the stay expire on time and went forward.

This is an issue that the Oregon court has considered. It would be an extraordinary remedy for this court to do it. An extraordinary remedy requires extraordinary facts. We have heard some factors that some courts have considered, but looking at the text of the statute and what Congress intended, Congress borrowed the language of the antiinjunction act, which is pretty narrow, either to protect or effectuate a judgment or necessary in aid of the Court's jurisdiction.

Essentially, it comes down to circumvention, either a

strong form where you have lawyers in the federal case using the state courts as a vehicle for improper discovery, or the weaker forum, kind of referred to as sort of a whiff of impropriety where a federal case is filed first, there is already a stay, and then someone files in state court to try to get around that. Obviously, neither of those are present here. Our view is for those reasons it doesn't satisfy the test of the statute.

THE COURT: Do you know what the schedule is for a decision on the motion to dismiss?

MR. FLEMING: Yes, your Honor. It was initially anticipated -- we filed our motion to amend in early April. We had a hearing in June. The Court initially thought that we were going to be able to get the complaint on file earlier. It took longer to get the second amended complaint on file than was originally anticipated because we were working through confidentiality issues. She anticipated hearing argument on the motion to dismiss at the end of August and issuing a decision prior to the expiration of a stay. She thought it would take her about a month. At the hearing on September 28, she said that and said, I scheduled it for the end of August because my September was less busy than my later months. So a month or longer would be my estimate if October is a busier month for the Oregon court.

THE COURT: Do I understand from your papers that you

are perfectly comfortable saying that any discovery that's produced in Oregon which is relevant to the federal action will be marked as confidential?

MR. FLEMING: It's defendants who would designate it as confidential. And this is the first --

THE COURT: That was your suggestion.

MR. FLEMING: I agree. And we have no objection. We have no objection to them making that designation. If they think in good faith that there is some document relevant to this action that they couldn't mark as confidential, we would happily amend the protective order to say that.

The last point I would make, unless your Honor has any other questions, goes to this issue. It goes to the question of what would be in our class certification motion. Because it's a breach of fiduciary duty claim and not a federal securities claim, our class certification motion is not going to include event studies, it's not going to include much on the merits at all. Usually, on a class certification motion in merger litigation the class certification issues deal with primarily the adequacy of the lead plaintiff. There may be confidential financial documents related to our client. As I stand here today, I can't imagine what additional confidential information we would put in our class certification motion or argue at the class certification hearing.

Unless your Honor has other questions, we would rest

on our papers.

THE COURT: No. Thank you.

Anyone else?

Yes.

MR. SWEDLOW: The Oregon state court rules, as the federal rules, don't allow a party, which would be comScore, in good faith to designate it as confidential, information that doesn't rise to the level of requiring the confidentiality designation. So we can't simply designate everything that's produced that's related to the federal case as confidential because that's not allowed. We can't simply have a private court system for a purpose when it's not allowed by the Oregon court system and it isn't allowed by the federal court system.

THE COURT: The representation in the papers is that so far all of the documents that have been produced have been marked as confidential.

MR. SWEDLOW: Right. I didn't do that.

THE COURT: Because in good faith you have concluded --

MR. SWEDLOW: No. I have not made any good-faith or bad-faith determinations.

THE COURT: Whoever it was on behalf of your client made --

MR. SWEDLOW: Also not correct. ComScore hasn't produced a single document in the case. Rentrak has. They are

not comScore documents. They have not designated or not designated anything. I don't feel comfortable, which is why I'm saying it here, blanketly designating the entire production as confidential because it's relevant to the federal case, simply because the federal plaintiffs might otherwise get it. That's not allowed. So I plead to the court to not make me designate something that doesn't satisfy confidentiality under Oregon rules so that the federal plaintiffs don't get it.

THE COURT: That's fine. I wouldn't want you to do anything that you think was not correct. The representation was that all of the documents that Rentrak produced so far and Rentrak has now been folded into comScore have been marked as confidential. Now, perhaps the universe of Rentrak documents are much more confidential than the universe of comScore documents and comScore is going to be far more selective in what it designates as confidential. We shall see.

I had always thought that part of the -- and the Supreme Court has spoken to this -- part of the purpose of a confidentiality order was to promote the expeditious production of documents and the purpose of Rule 502 is to accomplish the same thing with respect to privilege.

Now, maybe in its production, if it goes forward, comScore will be taking a far more restrictive approach to the production of documents that it makes. I don't have to decide those questions now.

MR. BERENSTAIN: Your Honor, may I be heard on that issue?

THE COURT: Sure.

MR. BERENSTAIN: Rentrak had designated documents as confidential that we have produced. It is also the case, your Honor, that the plaintiffs' position, which has been stated in writing to us, is that all of the documents we have produced are not confidential, according to the plaintiff's view, and that they have demanded that we designate all of the documents. In fact, they take a position in writing that not only all the documents that we have produced should not be treated as confidential and that if we refuse to de-designate they will seek that from the Court, but that all the documents that we are going to produce they have already taken the position that none of those is confidential either.

THE COURT: Sight unseen.

MR. BERENSTAIN: That's a dispute we understand we will have to deal with in an Oregon court.

But to the extent the plaintiff is now representing, the plaintiff's counsel in the Oregon litigation is now representing that they are perfectly fine with everything being produced as confidential as a way to shield information from the New York litigation, that is clearly an inconsistent position to what they have taken.

THE COURT: As a result of their protest that your

documents were incorrectly labeled as confidential, have you taken the confidentiality designation off any of those documents?

MR. BERENSTAIN: Not yet, your Honor, but we have committed to provide them our position on that I think in the next day or two. I can't remember what day. We are reviewing them and we intend to respond, based upon an agreement we reached with them.

THE COURT: Ok. Thank you.

I scheduled expedited briefing on the motion because I know that the parties want an answer quickly, and so I'm prepared to decide the motion now.

The Private Securities Litigation Reform Act ("PSLRA") provides that, in any federal securities action, "all discovery in other proceedings shall be stayed during the pendency of any motion to dismiss unless the Court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. Section 78u-4(b)(3)(D). The PSLRA is geared toward protecting defendants from abusive litigation tactics and strike suits. The automatic discovery stay affects that goal by precluding discovery until a motion to dismiss is denied and the case can proceed forward. Aware that creative plaintiffs could circumvent the automatic discovery stay, Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA"),

which provides that, "Upon a proper showing, a court may stay discovery proceedings in any private action in a state court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph." 15 U.S.C. Section 78u-4(b)(3)(D); *see also In re DPL, Inc., sec. litig.*, 247 F.Supp.2d 946, 947 (S.D. Ohio 2003)(quoting H.R. Rep. No. 105-640 at 17-18).

The federal defendants in this case have asked this Court, pursuant to SLUSA, to stay two somewhat parallel purported class action proceedings in Oregon state court filed by nonparty Ira S. Nathan, the trustee for the Ira S. Nathan Revocable Trust (the "Oregon state plaintiff").

The first Oregon litigation, *In re Rentrak Corporation Shareholders Litig.*, No. 15 Civ. 27429 (Multnomah County Circuit Court, Oregon), was filed in October 2015, over one year ago and five months prior to the filing of this federal action. The first Oregon action asserts claims against certain of the federal defendants, including Rentrak and more recently comScore, related to alleged breaches of fiduciary duty or aiding and abetting breaches of fiduciary duties. The second litigation, *Nathan V. Matta*, et al., No. 16 Civ. 32458, Multnomah County Circuit Court, Oregon), is a follow-on to the first litigation commenced by the same Oregon state plaintiff earlier this month, on October 3, 2016. The second Oregon

action brings Securities Act Section 11 claims against certain of the federal defendants, including members of comScore's board of directors and comScore's executive officers.

The second ground for staying a state court action under SLUSA -- "to effectuate the Court's judgments" -- is not implicated because there has been no judgment at this point. Accordingly, under the statute, the only possible ground for the discretionary stay is to stay the proceedings in aid of the Court's jurisdiction. Because the federal defendants have not met their burden of demonstrating that a discovery stay is necessary in aid of the Court's jurisdiction, their request is denied.

The purpose of the automatic discovery stay under the PSLRA is to ensure that unwarranted discovery does not make it into the hands of federal plaintiffs. The plaintiffs are required to state a plausible claim without subjecting the defendants to burdensome discovery and, therefore, discovery is stayed pending the decision on the motion to dismiss.

In this case there is little reason for concern that such discovery will leak out of the Oregon litigations for use in the federal litigation. There is a protective order in the first Oregon action and the papers can be filed in the state court under seal to the extent that they contain confidential information.

While there is no such protective order in the second

Oregon action, that action is still in its infancy and the counsel for the Oregon state plaintiff has indicated the receptiveness to entering into a confidentiality order or extending the confidentiality order.

Moreover, the scheduling order in this case provides that any amended complaint that responds to the motion to dismiss will be filed by December 14, 2016. The federal defendants point to a number of cases in which federal courts have stayed state cases under SLUSA, but in almost all of those cases the plaintiffs were attempting to circumvent the PSLRA's federal discovery stay through state discovery mechanisms or there was a real risk that the stay would be actually circumvented.

By contrast, the Oregon state actions are plainly not designed to circumvent the discovery stay, nor are they likely to circumvent the stay. The first Oregon action preceded the federal action by many months, while the second action is a clear outgrowth of the first.

The counsel representing the respective plaintiffs in the state and federal actions are different and it's plain that the counsel for the plaintiffs in the state and federal actions are at some odds in pursuing the two litigations. Illustratively, when counsel for the federal plaintiffs asked counsel for the Oregon plaintiff whether certain discovery was public, the counsel for the Oregon plaintiff's response was to

refuse the request and to immediately alert the federal defendants about the request.

The federal defendants, nonetheless, raise concerns that discovery could leak out from the Oregon actions through public proceedings and filings, but these concerns are speculative and there is a protective order in the first Oregon action which protects confidential information.

From a practical and logistical standpoint, it is unlikely that state discovery could be used in the federal litigation in time for the federal plaintiffs to bolster their allegations in the amended complaint such that the discovery could be used as a means to avoid an otherwise meritorious motion to dismiss. The relevant inquiry is not whether the discovery reaches the federal plaintiffs prior to the Court's decision on a Rule 12(b)(6) motion. Rather, it is whether the discovery reaches the federal plaintiffs in time for them to buttress their amended complaint in such a way as to defeat a motion to dismiss.

All of those arguments are speculative.

The second Oregon action is in its initial stages and, realistically, discovery cannot occur until after this date when an amended complaint will be filed in this federal action.

The Court's analysis has focused on the possibility that unwarranted discovery from the Oregon state proceedings could reach the federal plaintiffs and undermine the purposes

for a stay of discovery under the PSLRA. Given the purpose and language of the PSLRA and SLUSA, any interplay of those statutes, that is the proper inquiry. Indeed, SLUSA states that a stay should issue only as necessary to aid the Court's jurisdiction. 15 U.S.C. Section 78u-4(b)(3)(D). Section 78u-4(b)(3)(D) of SLUSA, read liberally and in light of the congressional purpose behind the statute, should effectuate the goal of the PSLRA's discovery stay to avoid abuse of litigation tactics by plaintiffs at the federal level. Other courts in this district have likewise focused on that inquiry in determining whether a stay should issue. *See, e.g., In re First Bancorp Derivative Litig.*, 407 F.Supp.2d 585, 586 (S.D.N.Y. 2006) ("While the case law on the interplay between the PSLRA automatic stay and discovery in state law derivative actions is less than perfectly consistent, on the whole, federal courts have refused to stay discovery in derivative actions brought independently of parallel securities fraud class actions."); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM 2004 WL 22052586, at *1, (S.D.N.Y. Sept. 28, 2004) focusing on the statutory language of SLUSA. In this case, a discovery stay is not necessary to aid the Court's jurisdiction over the federal action, and discovery in the Oregon actions will not undermine the purpose of the PSLRA's discovery stay.

The federal defendants urge the Court to follow a

three-factor test that some courts have used to determine whether a stay should issue: (1) the risk of federal plaintiffs obtaining the state plaintiff's discovery; (2) the extent of factual and legal overlap between the state and federal actions; and (3) the burden of state court discovery on defendants. *See Good v. De Lange*, No. 11 Civ. 2826, 2011 WL 6888649, at *2 (S.D. Cal. Dec. 29, 2011). Applying that test, the federal plaintiffs have still not met their burden of demonstrating that a stay should issue for substantially the same reasons discussed above.

The first two factors of this test are geared toward the inquiry already performed: Assessing whether federal plaintiffs will gain access to unwarranted discovery through abusive litigation tactics at the state level.

As to the first factor, as noted, there is little risk that the federal plaintiffs in this case will obtain the Oregon state plaintiff's discovery.

The second factor plainly operates in aid of the first factor. The second factor is a shorthand way of determining the relevance of any state discovery that could reach federal plaintiffs. The greater degree of overlap, the greater the relevance, the greater the concern that state discovery could compromise the PSLRA's discovery stay. However, if there is minimal risk that state discovery could leak out in the first place, then the degree of overlap becomes gratuitous to the

ultimate inquiry. Namely, will federal securities plaintiffs be able to bolster their allegations with state discovery. As already explained, that is not the case here.

Finally, while many courts assess the burden of the state discovery on the defendants, that argument is better directed to the state court. This is not a case where the defendants are forced to undergo burdensome discovery in aid of the federal actions which may be dismissed. Rather, the discovery is being sought in aid of a state court action which is set for trial in November 2017. If that discovery is overly burdensome for that trial, the defendant should raise that issue with the state court in Oregon.

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. For the foregoing reasons, the federal defendants' motion to stay the Oregon state actions is denied. The clerk is directed to close docket numbers 52, 55, 86, and 111. So ordered.

I appreciated the arguments. I appreciated the briefs. I look forward to seeing you on the next matter.

Thank you, all.

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